MOTION FILED
MAY 19 2000

Nos. 99-1388 and 99-1389

In The

Supreme Court of the United States

PHELPS DODGE CORPORATION,

Petitioners,

v.

THE UNITED STATES,

Respondents.

SALT RIVER VALLEY WATER USERS' ASSOCIATION,

Petitioners,

v.

THE UNITED STATES,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of The State Of Arizona

MOTION TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the implied federal reserved water rights doctrine applies to groundwater?

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION

Mountain States Legal Foundation ("MSLF") respectfully petitions this Court for leave to file the annexed brief *amici curiae* pursuant to Supreme Court Rule 37.2(b). Written consent of all the parties was sought pursuant to Supreme Court Rule 37.2(a).[1] The Solicitor General of the United States has given his consent to this *amici* brief. However, the San Carlos Apache Tribe, the Tonto Apache Tribe, the Yavapai Apache Indian Tribe, Camp Verde Reservation, and the San Juan Southern Paiute Tribe do not consent to the filing of this *amici* brief, and the Hopi Tribe objects to the filing of this brief because they were not provided with a copy of the brief by April 10, 2000. All parties did not respond within the time allowed.

IDENTITY AND INTEREST OF *AMICI CURIAE*

Mountain States Legal Foundation is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of private property rights, individual liberties, limited government, and the free enterprise system. MSLF's members include individuals and businesses from every state in the Union, including Arizona and other western states. Many of MSLF's members own

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[1] Copies of the consent letters received have been filed with the Clerk of the Court.

water rights in Arizona and other western states, upon which their communities and livelihood are dependent.

Since its establishment in 1977, MSLF has been active in litigation to preserve state water law principles. *See Sierra Club v. Yeutter*, 911 F.2d 1405 (10th Cir. 1990); *Riverside Irrigation District v. Andrews*, 758 F.2d 508 (10th Cir. 1985); *Sierra Club v. Watt*, 659 F.2d 203 (D.C. Cir. 1981). MSLF is currently representing the Cities of Salmon and Challis, Idaho, in water rights litigation before the Supreme Court of Idaho involving federal reserved water rights. *See In Re SRBA, Case No. 39576 – Wilderness Reserved Claims (Potlatch Corporation, et al. v. United States)*, 1999 Opinion No. 113 (Idaho October 1, 1999), *reh'g granted*, Nov. 30, 1999.

Montana Farm Bureau Federation ("MFBF") is a voluntary, non-profit, general farm and ranch organization incorporated under the laws of the State of Montana. MFBF represents the economic, educational, and social interests of more than 8,200 member families throughout the State of Montana. Twenty percent of the commercial farmers and ranchers in the State of Montana are members of MFBF. Many MFBF members hold state water rights for farming and ranching purposes and their local communities are dependent upon state water rights as well. MFBF is concerned about any potential water law precedent that infringes upon state control of water resources.

Idaho Farm Bureau Federation ("IFBF") is a voluntary, nongovernmental, nonpartisan organization of farm and ranch families incorporated under the laws of the State of Idaho. IFBF represents the economic, educational,

and social interests of its 12,000 farmer members, representing more than half the farms in the State of Idaho. Many IFBF members hold state water rights for farming and ranching purposes and their local communities are dependent upon state water rights as well. IFBF is concerned about any potential water law precedent that infringes upon state control of water resources.

Northwest Mining Association ("NWMA") is a nonprofit, nonpartisan trade association organized under the laws of the State of Washington, with its principal place of business in Spokane, Washington. NWMA was founded in 1895 by miners from the states of Idaho, Montana, and Washington, as well as several Canadian provinces. NWMA currently has 2,500 members residing in 42 states and 8 Canadian provinces. NWMA's purposes are: (1) to support and advance mineral resource and related industries; (2) to represent and inform members on technical, legislative, and regulatory issues; (3) to provide for the dissemination of educational material related to mining; and (4) to foster and promote economic opportunity and environmentally responsible mining. The mining industry and NWMA's members are closely tied to water rights and water law issues, as water is essential for mining activities. In fact, western water law originated in the mining camps of the west.

For the foregoing reasons, Mountain States Legal Foundation, Montana Farm Bureau Federation, Idaho

Farm Bureau Federation, and Northwest Mining Association request that this motion to file the annexed brief *amici curiae* be granted.

DATED: May 5, 2000

Respectfully submitted,

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION 1

IDENTITY AND INTEREST OF *AMICI CURIAE* 1

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS .. 1

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. THE DECISION OF THE ARIZONA SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT ON FEDERAL RESERVED WATER RIGHTS 2

A. This Court Has Always Recognized Congress' Long-standing Deference To State Water Allocation Principles 2

B. This Court Established The Federal Reserved Water Rights Doctrine As A Very Narrow Exception To State Water Allocation Principles 6

CONCLUSION 11

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963) 7

Atchison v. Peterson, 20 Wall. 507 (1874) 3

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 3, 5

Cappaert v. United States, 426 U.S. 128 (1976) 7, 8

Federal Power Commission v. Oregon ("Pelton Dam"), 349 U.S. 435 (1955) 5

In Re Rights To Use Water In Big Horn River System, 753 P.2d 76 (Wyo. 1988) 7, 8

Jennison v. Kirk, 98 U.S. 453 (1879) 3

United States v. Kagama, 118 U.S. 375 (1886) 6

United States v. New Mexico, 438 U.S. 696 (1978) 4, 5, 7, 9

United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899) 4

Winters v. United States, 207 U.S. 565 (1908). . .5, 6, 7, 9, 10

STATUTES

16 U.S.C. § 418 (1897), Organic Administration Act of 1897 4

43 U.S.C. § 321 (1877), Desert Lands Act of 1877 3

43 U.S.C. §§ 371 *et seq.* (1902), 1902 Reclamation Act 4

43 U.S.C. § 661 (1866), Mining Act of 1866.....3, 4

TABLE OF AUTHORITIES – Continued

Page

43 U.S.C. §§ 711 *et seq.* (1867) (repealed), Townsite Act 4

72 Stat. 1059 (1958), Act of Aug. 28, 1958 4

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, MONTANA FARM BUREAU FEDERATION, IDAHO FARM BUREAU FEDERATION, AND NORTHWEST MINING ASSOCIATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation respectfully submits this brief *amici curiae* on behalf of itself, Montana Farm Bureau Federation, Idaho Farm Bureau Federation, and Northwest Mining Association in support of Petitioners.[1]

IDENTITY AND INTEREST OF *AMICI CURIAE*

The identities and interests of *amici curiae* are set forth in the preceeding motion and are adopted herein.

OPINIONS BELOW, JURISDICTION, AND STATEMENT OF THE CASE

Amici hereby adopt Petitioners' description of the opinions below, statement of jurisdiction, and statement of the case.

[1] In compliance with Supreme Court Rule 37.6, *amici curiae* represent that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amici curiae* and their members, made a monetary contribution for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should grant this Petition for Certiorari because the decision of the Arizona Supreme Court below conflicts with decisions of this Court on the implied federal reserved water rights doctrine. The cases of this Court recognize Congress' long-standing deference to state water allocation principles. However, the Arizona Supreme Court's decision affords no deference to state water law. In addition, the implied federal reserved water rights doctrine was established by this Court as a very narrow exception to state water allocation principles. The Arizona Supreme Court's decision impermissibly and unnecessarily broadens the scope of this doctrine. This Court should grant Certiorari in order to address this conflict.

ARGUMENT

I. THE DECISION OF THE ARIZONA SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT ON FEDERAL RESERVED WATER RIGHTS.

A. This Court Has Always Recognized Congress' Long-standing Deference To State Water Allocation Principles.

During the mid-nineteenth century, in an effort to settle and develop the west, Congress gave up control of western water allocation. Congress' long-standing policy of deference to state water allocation principles was confirmed expressly when Congress recognized and protected state water rights in Section 9 of the Mining Act of

1866, now codified at 43 U.S.C. § 661.[2] *Atchison v. Peterson*, 20 Wall. 507, 513 (1874); *Jennison v. Kirk*, 98 U.S. 453, 458 (1879) ("These regulations and customs were appealed to in controversies in the State courts, and received their sanction; and properties to the value of many millions rested upon them.") Thus, historically, Congress deferred to state water law in recognition of the sheer value of property rights acquired under state water rights systems.

Subsequently, in passing the Desert Lands Act of 1877, now codified at 43 U.S.C. § 321, Congress severed the remaining unappropriated waters of the United States from the federal public lands, reserving the waters for the use of the public "under the laws of the states and territories." *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 162 (1935). Consequently, after 1877, the right to use water was to be determined according to state law.

Other laws in which Congress rejected a uniform federal water law to defer to state laws governing water rights include the Townsite Act, which provided for the establishment of townsites on federal lands, 43 U.S.C.

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[2] Section 9 of the Mining Act of 1866 provided:

> That whenever, by priority of possession, rights to use of water for mining, agriculture, manufacturing or other purposes have vested and accrued and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested right shall be maintained and protected in same. . . . 43 U.S.C. § 661.

This provision was preserved from repeal in 1872 and remains in effect as part of the General Mining Law.

§§ 711 *et seq.* (1867) (repealed); the Organic Administration Act of 1897, 16 U.S.C. § 418 (repealed), regarding administration of the national forest system; and the 1902 Reclamation Act, 43 U.S.C. §§ 371 *et seq.*, which assisted further water development in the western states.[3] In fact, the legislative history of the Reclamation Act makes clear that Congress considered adopting a uniform federal water law, but rejected such a notion because of the conflict and injustice that would result from displacing valuable rights obtained under state water laws.

In addition, this Court in *United States v. New Mexico*, 438 U.S. 696, 702 n.5 (1978), referred to "37 statutes in which Congress has expressly recognized the importance of deferring to state water law, from the Mining Act of 1866, § 9, 14 Stat. 253, to the Act of Aug. 28, 1958, § 202, 72 Stat. 1059, stating Congress' policy to 'recognize and protect the rights and interests of the State of Texas in determining the development of the watersheds of the rivers . . . and its interests and rights in water utilization and control.' "

This Court has since recognized a few exceptions to this general federal policy of deference to state water law. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899) (recognizing Commerce Clause authority to preserve navigability and water flows bordering federal

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[3] The Reclamation Act expressly provided that it was not to be construed to "in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder" and directed the Secretary of the Interior to "proceed in conformity with such laws." 43 U.S.C. § 383.

property); *Winters v. United States*, 207 U.S. 565 (1908) (recognizing implied federal reservation of water for Indian reservation).

For many years, *Winters* was seen as establishing a special rule applicable only to Indian reservations. This understanding was reinforced in *California Oregon Power*, 295 U.S. at 163-164, in which this Court praised the prior appropriation doctrine as essential to "the future growth and well being of the entire region" of western states.

Following the *California Oregon Power* decision, federal and state agencies and private appropriators all assumed that federal reserved water rights applied only to Indian reservations. *United States v. New Mexico*, 438 U.S. at 703 n.7. Although this assumption came to an end with *Federal Power Commission v. Oregon* (*"Pelton Dam"*), 349 U.S. 435, 448 (1955), in which the "public lands" of *California Oregon Power* were defined to exclude lands reserved for a specific purpose, this Court has more recently clarified that the federal reserved water rights doctrine is indeed a narrow doctrine.

In *United States v. New Mexico*, 438 U.S. at 701-702, 715, this Court emphasized Congress' historical policy of deferring to state water law and the narrow exception that the reserved rights doctrine made to that policy. This Court made clear that that federal policy is, and historically has been, to defer to state water law except where doing so would "entirely defeat[]" the purposes of a federal reservation. *Id.* at 700. Given the history of congressional deference to state water law and the absence of a federal common law with respect to water rights, the federal reserved water rights doctrine was never

intended to wholly supplant state water law. Rather, the doctrine is simply a limited mechanism for establishing federal water rights within the existing state system when absolutely necessary. The Arizona Supreme Court failed to heed these historical principles when it held that the implied federal reserved water rights doctrine extends to groundwater. This Court should grant this petition to resolve the conflict between the holdings of this Court and the holding of the Arizona Supreme Court.

B. This Court Established The Federal Reserved Water Rights Doctrine As A Very Narrow Exception To State Water Allocation Principles.

This Court first established the federal reserved water rights doctrine in *Winters v. United States*, 207 U.S. 654 (1908). This Court recognized that the lands reserved to the Indians were "arid, and, without irrigation, were practically valueless." *Id.* at 576. Because the treaty, or contract, between the federal government and the Indians had been completely silent with regard to water rights, this Court was forced to deal with the "conflict of implications" with regard to water rights under the agreement: reserved water rights for the reservation or the cession of water rights necessary for life by the Indians. *Id.* This Court had to decide which of the "two inferences" was intended by the agreement, opting for the one that "would support the purpose of the agreement" rather than "impair or defeat it," having no desire to see the Indians' ability to live on the reservation "destroyed . . . leaving them a barren waste." *Id.* at 577. Given the federal government's special trust relationship with Indian Tribes, *United States v. Kagama*, 118 U.S. 375, 384-385

(1886), this Court was certainly not inclined to decide that Congress had intended to set aside the reservation for the Indians without the water "necessary to sustain life." *Arizona v. California*, 373 U.S. 546, 598-599 (1963). In the context of federal reserved water rights, "Indian treaties should be interpreted generously and liberally in favor of the Indians." *In Re Rights To Use Water In Big Horn River System*, 753 P.2d 76, 96 (Wyo. 1988) (internal citations omitted).

The federal reserved water right implied in *Winters* was not an automatic "superpriority" in state-regulated waters to be invoked whenever the United States desires more water for use upon federal reserved lands. Rather, the doctrine constitutes a narrow exception to state water law, to be applied only when there is a serious "conflict of implications" going to the very purpose for which the lands were reserved. *Winters*, 207 U.S. at 577; *New Mexico*, 438 U.S. at 700-702.

The Arizona Supreme Court relied heavily on *Cappaert v. United States*, 426 U.S. 128 (1976), in determining that the implied federal reserved water rights doctrine applies to groundwater. However, *Cappaert* is inapposite on this issue. In *Cappaert*, this Court implied a federal reserved water right in the surface water of the pool inside Devil's Hole, part of a National Monument. *Id.* at 142. Although the reserved right affected the ability of the Cappaerts to pump groundwater within 2.5 miles of Devil's Hole, the reserved right was in the surface water in the Hole, not groundwater. *Id.* This Court specifically held that the Cappaerts had not acquired any appropriation rights under state law as of 1952 when Devil's Hole was reserved and the United States' rights vested. *Id.* at

139 n.5, 144 n.9. Therefore, the federal reserved water rights were superior to those of the Cappaerts. *Id.* at 143 n.8.

Thus, in holding that "the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater," this Court was doing nothing more than reaffirming the non-novel proposition that senior water rights trump junior rights under state law.[4] *Id.* at 143. In fact, this Court acknowledged that the Desert Land Act and its predecessors "provided that water rights vested under state law or custom are protected." *Id.* at 143 n.8.

The question presented in this case was specifically left open in *Cappaert*: "No cases of this Court have applied the doctrine of implied reservation of water rights to groundwater." *Cappaert*, 426 U.S. at 142. This Court went on to hold that the water in the pool was surface water, foregoing the need to address the groundwater question. *Id.*; *Big Horn River System*, 753 P.2d at 99 (acknowledging dearth of cases applying reserved rights doctrine to groundwater and recognizing that this Court did not do so in *Cappaert*). This Court should grant these Petitions in order to address this very question which was left open in *Cappaert*.

The federal reserved water rights doctrine is a judicial fiction created nearly a century ago to deal with a

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[4] Unlike Arizona, the State of Nevada, in which Devil's Hole is located, applies the law of prior appropriation to both surface and groundwater. *Cappaert*, 426 U.S. at 142.

perceived oversight of Congress and the Indians in establishing Indian reservations. *Winters*, 207 U.S. at 576. Not only has the doctrine outlived its usefulness, but extensions of the doctrine will only further upset 150 years of western water law and destroy investment-backed expectations of thousands of western water users.

The problems of arid lands and limited water resources are obstacles for all western landowners and users, not merely the federal government. Rights to use of these limited water resources must be obtained by the federal government under the same rules applicable to others whenever possible. Every extension of the reserved water rights doctrine defeats the uniformity and consistency achieved by state control of water rights, leaving instead uncertainty, robbed expectations, and stymied development in western communities. "In the arid parts of the West . . . claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams. This competition is compounded by the sheer quantity of reserved lands in the Western States." *New Mexico*, 438 U.S. at 699. The Arizona Supreme Court failed to acknowledge the original design of the implied federal reserved water rights doctrine as a very narrow exception to state water allocation principles when it held that the doctrine extends to groundwater.

This Court should return to the narrow reading of the federal reserved water rights doctrine embodied in *Winters*. Federal reserved rights should be found only where the essential purpose of a particular reservation would be defeated entirely because water rights obtained under state law would be virtually meaningless. In *Winters*,

upon acquiring reservation lands from the federal government, the Indians had reserved no rights in the water flows through the reservation for irrigation and similar purposes necessary to sustain life on the land. *Winters*, 207 U.S. at 576. As the water had been fully appropriated by others at the time of this Court's decision, leaving the Indians with no rights to use the water flowing through their reservation, the reservation land was rendered unlivable. *Id.* This is the rare type of situation that may warrant federal reserved water rights. The importance of maintaining state control over water rights in all other situations, as evidenced by Congress' consistent deferral to state water rights in federal matters, counsels a reaffirmation of the federal reserved water rights doctrine as a narrow doctrine, applicable only when a meaningful water right – unobtainable under state law – is necessary to avoid the complete failure of Congress' essential purpose and intent in reserving the land. This Court should grant these Petitions in order to reaffirm the implied federal reserved water rights doctrine as a very narrow exception to state water allocation principles.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant the Petitions for *Writ of Certiorari*.

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